



Separate Statement and Dissenting Views

Separate Statement of Commissioner Ruden

The Commission has worked very hard in a relatively short time to absorb and analyze complex economic issues on the basis of sometimes sharply conflicting testimony and opinions about rapidly changing industry conditions. Small travel agencies should be satisfied with many of the Commission's findings. Those findings include that

- (1) The survival of independent travel distributors is essential to assist and protect consumers,
- (2) The major airlines have adopted a deliberate strategy to bypass travel agents and that the bypass strategy is having a negative effect on the ability of traditional agents to compete and serve their customers,
- (3) Airline attempts to shift merchant fee costs to travel agents would be unreasonable and harmful to agents,
- (4) The Internet will not always produce better travel solutions than using a traditional travel agency,
- (5) The refusal of airlines to make web fares generally available to agents through CRSs is a real impediment to the efficient operation of travel agencies and thus may limit consumer choice,
- (6) The efforts of some airlines to foreclose travel agent use of third-party search software will impair consumer interests, and
- (7) The conclusion that Orbitz' most-favored-nation ("MFN") and related incentive arrangements are not necessary to such benefits as Orbitz brings to the market and the government should give serious consideration to compelling their elimination.

The travel agents' story has been told and has been heard. These are very important findings. They should not be seen as anti-airline. I, along with all of the Commissioners, am very concerned about the future viability of the airline industry. Neither consumers nor travel agents will succeed if the airlines do not resolve their long-standing economic problems. But those problems do not warrant a free pass for anticompetitive behavior. The findings summarized above reflect the testimony the Commission heard and were adopted after exhaustive debate. But they are not the whole story.

The Commission majority has, in my judgment, reached some conclusions that do not sufficiently come to grips with the implications of the airlines' exercise of market power for travel agents and, ultimately, for travel consumers. From those conclusions I respectfully register my dissent.

The Commission finds, for example, that the underlying problem impacting travel agents is that "the entire travel industry has been transformed by fundamental technological change" and that economic forces at work in the industry cannot be controlled. The fact of such transformation is undeniable, but another major cause of the current impairment of travel agents is the joint exercise of market power and abuse of dominant market position by the largest airlines. Airline marketing and other policies are interfering with travel agents' ability to adapt to technological change, and it is insufficient, in my judgment, to place the responsibility on technology and tell agents that they had better adapt or face extinction. The government has the power to address market power and should do so. It is time to stop the relentless approval of joint venture after joint venture, some with immunity from the antitrust laws, that reinforces airline tendencies to work collaboratively rather than competitively.

The Commission's declaration that airline bypass strategies are not unfair or anticompetitive, if not adopted collusively or through abuse of market power, does not square with its findings, or independently observable facts, about Orbitz. The marketplace is unlikely, in my view, to resolve the Orbitz issues, which include not only the MFN but the more fundamental issue of joint airline entry into retail competition with online and offline travel agents. Orbitz is a form of collusion with respect to retail competition and represents an extraordinary aggregation of market power that is unlikely to be healthy for long-run

competition in the travel marketplace. The logic of the Commission's own analysis suggests a more definitive recommendation that, at a minimum, the MFN should be ended.

The Commission further finds that the deterioration in the condition of the independent travel distribution system has not had, and will not have, a material effect on consumers. I respectfully, but strongly, disagree. The airlines have succeeded in shifting billions in costs to consumers through a process that the Commission finds elsewhere is having a negative effect on agents' ability to compete. Consumers continue to show a preference to use travel agents as the primary link to the air transportation system. Internet technology is not going to save consumers from airline domination of retailing. If airline aspirations for hegemony over distribution are not restrained, airlines will gain the power to use the technology against consumers. This issue is bigger than Orbitz, though Orbitz is often the surrogate in discussion and debate for the broader problem of airline attempts to control the information consumers get and, ultimately, the prices they pay.

The Commission was concerned about unintended consequences of government intervention in the marketplace. That is a valid concern, but I am at least equally concerned about the airline-intended consequences of non-intervention. Rather than allowing Orbitz and other airline joint arrangements to disadvantage independent distribution, consumers would be better off if, among other things, all public non-opaque fares were available through all channels. Contrary to the Commission's finding on this point, such ubiquity would increase competition among retailers of all kinds, enabling consumers to deal with the channel of their choice and still have access to all pricing options in our only national transportation system. I see little risk that such a requirement would lead, as the Commission suggests, to elimination of web fares or to other perverse consequences worse than airline joint domination of retailing. Through their yield management systems, airlines would still be able to manage the volume of such fares, and would have no reason to curtail them. Unless, of course, the web fares are, as the Commission correctly found, strategic rather than cost-driven, in which case the argument for requiring ubiquity is even more compelling.

It was argued, and the report reflects, that there has been some movement in the marketplace regarding agent access to web fares.

Some of those developments are certainly encouraging, but it is far too early to celebrate that airline-created obstacles to efficient agent access to web fares have been vanquished.

The Commission's analysis suggests that it was reluctant to recommend compulsory full-access to web fares because doing so would not resolve the more structural issues agents face as a result of technology change and airline bypass strategies. No one has ever contended that full access to web fares would resolve every problem facing travel agents. But it was argued, and I think persuasively, that access to web fares would fundamentally improve the agents' ability to compete in the changing market and would improve consumers' opportunities to find optimal travel values. Since the fate of travel agents was, under the governing statute and in the debates of the Commission, a surrogate for assuring consumer welfare, ubiquitous distribution of web fares would have served all the relevant goals. In all events, whatever we might conclude with regard to other industries, consumers are entitled to a national air transportation system that, while privately owned and operated, permits travelers to find optimal value by dealing with the distribution mechanism of their choice. The Commission has done some very valuable work, I believe, but has stopped short of recommending the solutions that would fulfill the essentials of its goals.

Dissenting Statement of Commissioners Dunne, Murphy and Roper*

The Commission's report is a positive contribution. It is balanced and constructive. It departs from that approach only in its characterization of Orbitz. The report is overly critical of this significant new Internet travel site, and provides no factual basis for its unduly negative tone.

Competitors' criticisms of Orbitz intruded unduly on the Commission's proceedings. In spite of the volume of materials presented on Orbitz, little or no empirical data or evidence of competitive harm was presented. These critical comments are more properly seen as confirmation of the positive competitive impact of Orbitz. Nonetheless, several of these unsubstantiated criticisms of Orbitz have been incorporated into the Commission's report.

In addition, the report is unbalanced in its criticism of Orbitz. It does not include commentary on the positive attributes of Orbitz, even though that system unquestionably brought more sophisticated software and hardware into the industry, increased price competition, improved the quality of information available to consumers, and made web fares more widely available than they were previously. Orbitz has pressured its older online competitors to modernize, to become more price competitive, to obtain web fares, and to improve the usefulness of their sites to consumers. The multiple-airline ownership of Orbitz is a positive development, not a basis for suspicion, since this structure is ideal for ensuring an unbiased system that fairly presents the schedule offerings of the airlines. This unbiased approach is significant since the slanting of schedule information has long been an industry issue. In fact, travel agents still receive substantial revenues in the form of "commission overrides" and similar incentive payments – designed to direct sales toward particular airlines. Orbitz avoids this biasing behavior.

Most importantly for purposes of this Commission, it now appears that Orbitz is bringing the benefits of competition not only to its online competitors, but to the major CRSs as well. Sabre just announced that it will offer to all airlines the option of a multi-year reduction in CRS booking fees in return for each airline's commitment to make its web fares available on Sabre, and therefore to all Sabre-using travel

agents. Sabre, which has been critical of Orbitz MFN in our hearings has now adopted the reduced-booking-costs-in-return-for-webfares approach that is at the heart of the Orbitz MFN. The ongoing development of this type of competition will spread the availability of web-fares to agents – a positive trend for airlines, agents and consumers.

The report's discussion of the MFN clause is inappropriately and unsupportably critical. There is nothing anti-competitive or harmful with an effort to attract as many web fares as possible to one Internet site — on a non-exclusive basis — so that consumers can have access to a large array of web fares as they “surf the internet” for their best travel options. We consider this service “consumer friendly.”

The Commission is correct that the Department of Justice needs to complete its review of Orbitz. DOJ and DOT have been reviewing Orbitz for over two years, and these drawn-out reviews are used by Orbitz' competitors to attack Orbitz in Congressional hearings, to further develop its business plan.

** Commissioner Dunne serves at the appointment of House Minority Leader Richard Gephardt.*

** Commissioner Murphy serves at the appointment of Secretary Norman Y. Mineta and was appointed as the statutorily required airline industry representative to this Commission. Consistent with that role, his employment is as an aviation consultant, and two of his firm's clients are passenger airlines, including one that is a founding partner of Orbitz. The other does not participate in the system. He has not been compensated by any entity for his work on this Commission.*

** Commissioner Roper serves at the appointment of House Speaker Dennis J. Hastert.*